SUPREME COURT, U.S.
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No. 94-262

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HUGHES AIRCRAFT COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

JOHN J. HIGGINS
HUGHES AIRCRAFT COMPANY, INC.
7200 Hughes Terrace
P.O. Box 80028
Los Angeles, CA 90090

KENNETH W. STARR
Counsel of Record
CHRISTOPHER LANDAU
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000

JOSEPH E. PAPELIAN
GENERAL MOTORS CORP.
3031 West Grand Boulevard
P.O. Box 33122
Detroit, Michigan 48232

Dated: October 19, 1994

Attorneys for Petitioner

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The Government's Opposition seeks to portray this case as a quirky anomaly that does not necessarily implicate the several circuit splits outlined in Hughes' petition. The Court need not review the intracorporate conspiracy issue, the Government asserts, because there is as yet no *direct* split under this *particular* conspiracy statute. And there is no need to review the inconsistent verdict issue, the Government then maintains, because the direct split that *does* exist on that particular issue may yet go away. But these gossamer—not to mention inconsistent—distinctions cannot obscure the basic fact that both issues involve significant legal questions that have long bedeviled the lower courts and were incorrectly resolved below. This case extends vicarious criminal liability beyond all bounds of law and logic, holding a corporation liable for

conspiracy based entirely on the conduct of its own employees—indeed, based entirely on the conduct of a single *acquitted* employee.

1. The Government's arguments on the intracorporate conspiracy issue are based on a flawed premise: that the question here is whether to "engraf[t] an intra-corporate *exception* onto the broad language of Section 371." Opp. at 9 (emphasis added). That premise, of course, begs the real question: just how "broad" *is* the reach of § 371? Until that question is answered, there is no reason to address any possible "exception" to the statute's coverage. The Government's arguments here fail not because of any intracorporate *exception* to conspiracy law, but for the simple reason that conspiracy law does not in the first instance extend as far as the Government would like.

The Government first defends its interpretation of the statute on "plain language" grounds. Because § 371 refers to "two or more persons" and two or more Hughes employees were alleged to have conspired, the Government asserts, the statute's "plurality" requirement is satisfied. Opp. at 5-6. As Hughes noted in its petition, however, Pet. at 5-6, the question is not whether "two or more persons" can be convicted of conspiracy, but rather whether *a single legal entity* can be convicted of conspiracy based solely on the conduct of two or more of its members. And on this question, the language of § 371 in no way supports the Government. Indeed, to the extent the language of § 371 is "plain," it supports Hughes. The statute refers not only to "two or more persons," but to "each" of them, and a single entity cannot logically be both "two or more persons" and "each" of those persons at once. Notwithstanding its insistence that the language is "plain," the

Government fails to mention, much less address, this textual point.[1]

The Government next challenges Hughes' interpretation of the common law of conspiracy, but again succumbs to the temptation to substitute conclusion for reasoning. Opp. at 6-7. The common-law crime's "plurality" requirement, the Government asserts, is satisfied by the participation of two or more natural persons, and Hughes "has not pointed to any common law support for its argument" to the contrary. *Id.* A quick scan of pages 7-9 of Hughes' petition, however, readily refutes both assertions—the common law has long recognized that (1) a single legal entity made up of multiple natural persons cannot be convicted of conspiracy among such persons, and (2) corporations are indivisible legal entities. The cases cited by the Government in support of its position are of recent vintage and base their conclusions—to the extent they pause to provide any reasoning at all—on policy grounds.[2]

Finally, the Government brandishes that ultimate weapon of interpretive desperation, the statute's "purpose."

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[1] The Government inexplicably contends in a passing footnote that Hughes' liability "did not rest on a *finding* that the corporation stood in the shoes of 'each' co-conspirator." Opp. at 6 n.2 (emphasis added). That is true, but irrelevant—Hughes should never have been indicted on the basis of an entirely intracorporate conspiracy in the first place. There has never been any contention in this litigation that any of the alleged co-conspirators acted other than in the corporation's interests. Indeed, the jury was instructed that in order to convict Hughes of conspiracy, the corporation must have "*act[ed] through* LaRue, *and* at least one of the unindicted co-conspirators, namely, James Temple, Frank Saia, Margaret Goodearl and/or Marion Tolby." App. 31a (emphasis added). Both the District Court and the Ninth Circuit squarely rejected Hughes' intracorporate conspiracy argument on the merits, not on the absence of any specific jury "finding"—which in any event the Government never requested— about the basis of Hughes' vicarious liability.

[2] The sole case cited by the Government with any conceivable claim to a historical pedigree, *Mininsohn v. United States*, 101 F.2d 477, 478 (3d Cir. 1939), does not—as the Government acknowledges, Opp. at 7—discuss this issue, and its silence can hardly be regarded as authoritative.

Echoing the court below, the Government contends that if a court were to "appl[y] the intracorporate conspiracy doctrine to this case, *no* corporation acting on its own behalf by and through its employees could be found guilty of conspiracy." Opp. at 9 n.3 (quoting App. at 8a-9a; emphasis added). As an initial matter, of course, invocation of "purpose" is unseemly and unhelpful in construing criminal statutes. The "purpose" of *any* criminal statute can invariably be said to be furthered by its broadest possible interpretation, since that would presumably give the Government the broadest possible leeway to ferret out wrongdoing. But our legal tradition establishes precisely the opposite interpretive rule: criminal laws are, if anything, to be construed narrowly, with ambiguities to be resolved in a defendant's favor. The Government's invocation of "purpose," if taken seriously, would wipe the rule of lenity off the books.

At any rate, the Government's dire predictions about the policy consequences of Hughes' position are entirely baseless. Like the Court below, the Government asserts that Hughes' interpretation of § 371 would "*shield* a corporation or its agents from criminal liability where its agents acted on its behalf." Opp. 6 (emphasis in original; internal quotation omitted). But that is wrong—as the Government itself notes, Hughes in no way challenges the traditional rule that a corporation may be convicted of conspiracy based on its agents' conduct *as long as at least one co-conspirator was outside the corporation*. Opp. at 5 (citing Pet. at 9). Hughes' point is a narrow one: based on the text and history of § 371, a corporation cannot be convicted of conspiracy based *solely* on the conduct of its own employees acting on its behalf. That does not "shield" the corporation from liability any more than the "overt act" requirement of conspiracy law might be said to "shield" a putative conspirator who committed no such act, or the requirement of proximate causation might be said to "shield" an alleged tortfeasor who contributed only remotely to an injury. The conspiracy statute, like other laws, simply has its limits, pesky as those might seem to a zealous prosecutor.

The Government fares little better in its attempt to distinguish away the welter of circuit splits involving the intracorporate conspiracy issue. The Government cannot, and does not, deny the confusion in this area. Opp. at 9-11 & nn. 4, 5. Rather, the Government seeks to avoid review in this particular case by slicing the issue into fine slivers, and then, one by one, distinguishing the other slivers from this one. While determining the appropriate level of generality at which a legal question is best framed is hardly an exact science, the Government simply goes too far in its attempt to narrow the issue presented here.

Because this case arises under § 371, the Government contends, its resolution would "she[d] little light" on the proper interpretation of *other* federal conspiracy provisions. Opp. at 11. But even a moment's reflection reveals the fallacy of that reductionistic approach. The U.S. Code contains over 300 separate provisions proscribing—but not defining—"conspiracy." It is silly to think that Congress intended each one of these provisions to be interpreted independently and abstractly. To the contrary, whenever Congress adopts a venerable term like "conspiracy," it presumptively incorporates settled legal antecedents. *See, e.g., Morissette v. United States*, 342 U.S. 246, 263 (1952). There must, in other words, be some background norm governing the interpretation of "conspiracy" absent a specific indication to the contrary.

Section § 371 is the fountainhead of American conspiracy law: it is the basic conspiracy provision in the federal criminal code, and employs boilerplate language tracked by most other conspiracy provisions. If there is *any* provision in the U.S. Code that might be deemed to set forth a background rule, § 371 is it. That is why, as the Government notes, it is to § 371 that courts have long turned for guidance when construing the conspiracy provisions of various other statutes, like the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1986, *see United States v. Hugh Chalmers*

Chevrolet-Toyota, Inc., 800 F.2d 737, 738 (8th Cir. 1986), the Commodity Credit Corporation Charter Act, 15 U.S.C. § 714m(d), *see United States v. American Grain & Related Inds.*, 763 F.2d 312, 320 (8th Cir. 1985), and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 846, *see United States v. Mahar*, 801 F.2d 1477, 1488 & n.19 (6th Cir. 1986). Obviously, at some level every conspiracy provision can be distinguished from every other provision, just as every person can be distinguished from every other person—but the question always is whether an asserted distinction makes a difference.

The court below invoked a civil/criminal distinction to distinguish a contrary line of conspiracy cases, but then perversely gave the criminal provision a *more expansive* scope. App. at 8a. The Government wisely refrains from invoking that counterintuitive distinction, preferring instead to rely on a purported subject-matter distinction—*i.e.*, antitrust, civil rights, and RICO must each be treated as *sui generis*. But it is impossible to assess whether any of those specific fields requires a departure from general conspiracy norms without first knowing what those general norms are. And the Government fails to address the perverse nature of its purported subject-matter distinctions, avoiding, for example, the question why one would ever construe a *criminal* conspiracy statute like § 371 more broadly than a *civil-rights* conspiracy statute like 42 U.S.C. § 1985.

Even framing the issue here in the narrowest possible terms, limited to § 371, the lower courts are still divided on the intracorporate conspiracy question. The approach adopted below conflicts with the First Circuit's approach in *United States v. Notarantonio*, 758 F.2d 777 (1st Cir. 1985). The Government attempts to sidestep this point by contending that *Notarantonio* is limited by another First Circuit opinion, *United States v. Peters*, 732 F.2d 1004 (1st Cir. 1984). That argument might wash if *Peters* had been decided after *Notarantonio*, but it was not. The argument thus fails for the same reason that

Plessy v. Ferguson, 163 U.S. 537 (1896) cannot be said to "limit" *Brown v. Board of Education*, 347 U.S. 483 (1954).

While the legal issues raised in this case are intriguing, they are far from academic. Indeed, as Hughes' *amici* point out, the scope of the conspiracy laws is a high-stakes issue for American business. By stretching the law of conspiracy—long "the darling of the modern prosecutor's nursery," *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (L. Hand, J.)—far beyond its traditional bounds, this case opens up vistas of potentially limitless corporate liability. The time has come to draw the line.

2. The Government next urges that Hughes' conspiracy conviction should not be affected by the acknowledged inconsistency between that verdict and the acquittal of LaRue, on whom the corporation's vicarious liability is necessarily based. *See* Opp. at 3, 16 n.6. Again, however, the Government sidesteps Hughes' central point. The Government simply recites the general rule that "'[i]nconsistency in a verdict is not a sufficient reason for setting it aside.'" Opp. at 11 (quoting *Harris v. Rivera*, 454 U.S. 339, 345 (1981) *(per curiam)*). But Hughes never challenged that general rule—only its newfangled extension into conspiracy law. The Government's approach toward this second issue, in other words, is precisely the opposite of its approach to the first—whereas it frames the first issue with a high degree of *specificity* in an attempt to distinguish away a number of circuit splits, here it frames the issue at a high level of *generality* in an attempt to obscure the traditional conspiracy exception to the general rule condoning inconsistent verdicts.

The Government's arguments on this second issue, thus, begin and end with this Court's decision in *Dunn v. United States*, 284 U.S. 390 (1932). The *Dunn* rule has long been the law of the land and, according to the Government, it should "'remain that way.'" Opp. at 13 (quoting *United States v. Powell*, 469 U.S. 57, 69 (1984)). But that exhortation again begs the question—just how far does the *Dunn* rule extend? As

explained in Hughes' petition, this Court has never extended it to conspiracy cases. To the contrary, notwithstanding *Dunn*, this Court—and the lower courts—have routinely applied a "rule of consistency" in conspiracy cases, holding that a conspiracy conviction cannot stand where all but one conspirator is exonerated. Pet. at 18-20. The Government attempts to distinguish Hughes' Supreme Court cases on the ground that they did not involve inconsistent verdicts rendered by a *jury*, but rather inconsistent verdicts produced by an *appellate court's* reversal of a conviction. But that distinction is utterly contrived: it is nowhere to be found in the relevant cases, which rely instead on the general principle that a conspiracy conviction *cannot stand as a matter of law* where all alleged conspirators but one are exonerated. It makes no difference whether that exoneration is effected by a jury or a court—indeed, if anything it makes *more* sense to reverse a conviction on inconsistency grounds where that inconsistency can be attributed to the jury, the factfinder of first instance.

And if further proof were needed that the *Dunn* rule and the "rule of consistency" are distinct, one has only to look at the solid wall of lower-court precedent applying the latter rule in the decades following *Dunn*. *See* Pet. 19-20. That wall began to crumble in the wake of this Court's decision in *Powell*, but that case did not involve conspiracy, and thus did not call the rule of consistency into question any more than did *Dunn* itself. While it is true, as the Government notes, that the Sixth and Tenth Circuits have not squarely *reaffirmed* the rule in light of *Powell*—neither court has had to go so far to resolve a case—that misses Hughes' point. Neither circuit has *abandoned* its longstanding adherence to the rule, so the pre-*Powell* cases endorsing it remain the law. *See Apodaca v. United States*, 188 F.2d 932, 940 (10th Cir. 1951); *United States v. Williams*, 503 F.2d 50, 54 (6th Cir. 1974).

The possibility that the Sixth and Tenth Circuits might eventually join the others in jettisoning the rule of consistency, moreover, affirmatively *supports* review here. The rule is a

venerable tenet of criminal procedure, and formed part of the legal background against which the conspiracy statute was enacted and re-enacted. At the very least, the rule should not be abolished without this Court's express approbation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN J. HIGGINS
HUGHES AIRCRAFT
COMPANY, INC.
7200 Hughes Terrace
P.O. Box 80028
Los Angeles, CA 90090

KENNETH W. STARR
Counsel of Record
CHRISTOPHER LANDAU
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000

JOSEPH E. PAPELIAN
GENERAL MOTORS CORP.
3031 West Grand Boulevard
P.O. Box 33122
Detroit, Michigan 48232

Attorneys for Petitioner

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